# Nos. 797, 804, 808, 809

IN THE

# Supreme Court of the United States

## October Term, 1967

AMERICAN COMMERCIAL LINES, INC., et al.,
*Appellants in No. 797*

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,
*Appellants in No. 804*

THE AMERICAN WATERWAYS OPERATORS, INC.,
*Appellant in No. 808*

INTERSTATE COMMERCE COMMISSION,
*Appellant in No. 809*

*v.*

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, et al.,
*Appellees*

**On Appeal From the United States District Court for the Western District of Kentucky**

## MOTION TO AFFIRM


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INTERSTATE COMMERCE COMMISSION,
*Appellant in No. 809*

*v.*

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,
*Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

## MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(d) of the Rules of this Court, the appellee railroads[1] move that the judgment of the District Court be affirmed.

1. The appellee railroads include the Louisville and Nashville Railroad Company and The Pennsylvania Railroad Company, complainants below, and 48 other Class I railroads which were permitted to intervene in support of the complainants. See Brief of Railroads in court below, at p. 59, for list of interveners.

## STATEMENT

Involved are four appeals from a judgment [2] of a three-judge district court entered on May 15, 1967, pursuant to its opinion in *Louisville and Nashville Railroad Co. v. United States*, 268 F. Supp. 71 (W.D. Ky. 1967).[3] In its opinion, the court below, without dissent, set aside an order of the Interstate Commerce Commission in *Ingot Molds, Pa., to Steelton, Ky.*, 326 I.C.C. 77 (1965) [4] and remanded the matter to the Commission "for reconsideration and such further action as the Commission may deem appropriate, not inconsistent with the opinion this day reached by this court." [5]

In the order which accompanied its report, the Commission required the railroads to cancel a reduced rate of $5.11 per ton on ingot molds moving in multiple car shipments from Neville Island and Pittsburgh, Pa. to Steelton, Ky., even though the Commission had found that the rate was at the same level as the charge of the competing barge-truck route; [6] that it was required by the railroads if they were to effectively compete; [7] that it ceeded by a substantial margin the railroads' out-of-pocket costs of $4.689 —*i.e.*, all of the expenses incurred by the railroads in pro-

2. Jur. St. in No. 797 at App. 22-23.

3. Jur. St. in No. 797 at App. 1-21.

4. Jur. St. in No. 797 at App. 49-69. It should be noted that three commissioners, Vice Chairman Bush, Commissioner Freas and Commissioner Tierney, dissented in three separate dissenting opinions, 326 I.C.C. at 85-86, 86-90, 90-91; and that Division 2 of the Commission, which first considered the lawfulness of the reduced rate, approved it without dissent, Ingot Molds, Pa., to Steelton, Ky., 323 I.C.C. 758 (1965).

5. Jur. St. in No. 797 at App. 22.

6. 326 I.C.C. at 78-79.

7. *Id.* at 78.

viding the service,[8] computed by the Commission's own formula—and therefore was both compensatory and profitable; and, that it would maximize the amount available to meet the railroads' constant expenses.[9] There was no finding by the Commission that this constructive pricing adjustment, which affords the shipper the choice of two competing services at the same price, was discriminatory or unlawful by any standard regularly used by the Commission in judging the reasonableness and lawfulness of carrier rates.[10]

The Commission's sole basis for ordering the cancellation of the reduced rail rate was its conclusion that the railroads had "unlawfully impinged upon the ability of the barge-truck mode competitively to assert its inherent cost advantage." [11]

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8. *Id.* at 78-79. For details as to the compensativeness of the reduced rail rate, see Report of Division 2 of the Commission, 323 I.C.C. at 760-762. Out-of-pocket costs, as computed by Rail Form A, include all of the expenses that can be assigned directly to a particular traffic movement plus 100 percent of the return on the depreciated value of equipment and 50 percent of the return on the depreciated value of road property. By contrast, fully-distributed costs include, in addition to the out-of-pocket costs, arbitrary assignments of constant expenses which, by their nature, "cannot be traced to particular units of output." See EXPLANATION OF RAIL COST FINDING PROCEDURES AND PRINCIPLES RELATING TO USE OF COSTS, I.C.C. COST SECTION STATEMENT No. 7-63 at 3, 4 (1963); Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815, 840-841 (1963). This Court has recognized that Rail Form A out-of-pocket costs cover the expenses of providing a particular service. See Chicago & N.W. Ry. Co. v. A.T. & S.F. Ry. Co., — U.S. —, 87 Sup. Ct. 1585, 1590 (1967).

9. 323 I.C.C. at 763-764, 326 I.C.C. at 81-82.

10. It should be noted that Division 2, which first considered the rate, found that it was lawful in all respects, saying:

> . . . we find for the encouragement of lawful competition and conclude that the proposed rate is just and reasonable, and, consistent with the [Supreme] Court's evaluation of section 15a(3) in the *New Haven case*, not destructively competitive. 323 I.C.C. at 765.

11. 326 I.C.C. at 85.

The railroads filed a complaint asking the lower court to enjoin and set aside the Commission's order on the grounds that it was without a rational basis and was not in conformity with law. Although the United States is a mandatory defendant in suits brought to set aside orders of the Commission, the Government did not undertake to defend but on the contrary filed an answer admitting that "the order of the Interstate Commerce Commission is invalid."

After receiving briefs and hearing oral argument, the lower court set aside the Commission's order "*first,* because it lacks a rational basis and thus is arbitrary and, *second,* because it is inconsistent with the objectives and purposes of Congress in enacting Section 15a(3) of the Interstate Commerce Act . . . and thus is not in accordance with law." [12]

Four jurisdictional statements have been filed by the several appellants. In each there is a request that this Court note probable jurisdiction.[13]

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12. 268 F. Supp. at 75-76.

13. Jur. St. in No. 797 at p. 14; Jur. St. in No. 804 at p. 18; Jur. St. in No. 808 at p. 9; Jur. St. in 809 at p. 17.

## ARGUMENT IN SUPPORT OF THE MOTION

Involved in the proceedings before the Commission and in the lower court was the problem of how inherent advantage of lower costs is to be "recognize[d] and preserve[d]" as required by the National Transportation Policy and Section 15a(3) of the Interstate Commerce Act. This Court, in its opinion in *Interstate Commerce Commission v. New York, N.H. & H.R. Co.*, 372 U.S. 744, said the question "should be left for initial resolution to the Commission's informed judgment" (*Id.* at 761).

The appellee railroads do not here take the position that this is an unimportant question. To the contrary, it is of the utmost importance to them because their ability to grow and prosper in some measure commensurate with the economic growth of this nation depends upon its sound and intelligent solution. But they do say that the lower court's consideration was so thorough and its conclusions so obviously correct that plenary review by this Court is unnecessary and the granting of this Motion to Affirm would be appropriate.

Reduced to essentials, the several appellants' cases for plenary review are bottomed upon a claim that the lower court has laid down a rigid rule of law which deprives the Commission of its jurisdiction with respect to the recognition and preservation of the inherent advantage of lower costs.[14] This simply is not so.

The lower court plainly indicated that while normally Section 15a(3) requires the Commission not to interfere with reduced rates which are compensatory and beneficial to the proponent mode, deviation from this rule is per-

14. Jur. St. in No. 797 at p. 8; Jur. St. in No. 804 at pp. 13-14; Jur. St. in No. 808 at p. 6; Jur. St. in No. 809 at pp. 8-11.

mitted if the Commission articulates a rational basis for doing so.[15]

A review of the legislative history of Section 15a(3) the lower court says, demonstrates that Congress intended the Commission should normally recognize and preserve inherent cost advantage by adhering to the principles announced by it in *New Automobiles In Interstate Commerce*, 259 I.C.C. 475 (1945). If this is done, the objective of the Congress in enacting the Transportation Act of 1940 will be insured.[16]

As the lower court notes, in *New Automobiles*, the Commission in 1945 was concerned with the preservation of inherent advantages as required by the National Transportation Policy which had been brought into being by the Transportation Act of 1940. The Commission there concluded that the Policy in this respect would be served if reduced rates are required to be compensatory—that is, exceed out-of-pocket costs. In reaching this conclusion, the Commission rejected a demand of a competing mode that fully-distributed costs should be the floor for reduced rates. The lower court explains that the approach of the Commission in *New Automobiles* was consistent with the intent of Congress in enacting the Transportation Act of 1940, since, in the face of strong pressures, Congress itself had also rejected fully-distributed costs as the floor for reduced competitive rates.[17]

Because the stated objective of the Congress in 1958 for the new rule of intermode competitive ratemaking, incorporated in Section 15a(3), was to require the Commission in the future normally to adhere to the legal and economic principles of *New Automobiles*—from which it had deviated

15. 268 F. Supp. at 82.
16. *Id.* at 79-82.
17. *Id.* at 81-82.

in the years following their earlier pronouncement [18]—the lower court concluded that in the absence of strong justification to the contrary, *New Automobiles* should control contemporary reduced intermode pricing.[19]

The Commission's decision in *Ingot Molds* requiring the cancellation of a reduced railroad rate which is well above out-of-pocket costs and admittedly compensatory,[20] and which will make available profits to cover the railroads' constant costs not incurred in providing the ingot molds service, is plainly contrary to the principles of *New Automobiles*.[21] Thus, unless the Commission has set forth a strong justification for deviating from those principles, it must be concluded, as did the court below, that the *Ingot Molds* decision is contrary to law.

But as the lower court has explained in careful detail, the Commission's attempted justification for the deviation will not survive scrutiny.

The Commission in *Ingot Molds* says the existence of low-cost advantage, i.e., relative efficiency from a cost standpoint, should be determined by comparing the competing modes' fully-distributed costs. Its justification for this amounts to nothing more than a statement that it has done so in previous cases, and that not to do so here might be harmful to the protesting mode.[22] The self-apparent weakness of this conclusory justification is highlighted, as the court below explains, by the fact that nowhere in the earlier cases relied upon as precedents is there any explanation as to why fully-distributed cost comparisons should be used as the measure.[23] And in the one case referred to by the Commission where there was any re-

18. *Id.* at 79.
19. *Id.* at 80-82.
20. 326 I.C.C. at 78, 79, 82; 323 I.C.C. at 761, 763-764.
21. 268 F. Supp. at 82.
22. 326 I.C.C. at 82-84.
23. 268 F. Supp. at 76-78.

liance upon economic principles in selecting the cost level to measure inherent advantage of lower costs, fully-distributed costs were discarded and out-of-pocket costs used instead.[24] Further, as the lower court says, the failure of the Commission in *Ingot Molds* to provide adequate reasons for using fully-distributed costs as the measure of inherent advantage was "particularly wanting" because there was before it the unrebutted testimony of distinguished economists which strongly urged the use of out-of-pocket costs for this purpose.[25] While the Commission was not obli-

24. As the lower court notes, 268 F. Supp. at 77, the Commission in *Ingot Molds* referred to Grain in Multiple Car Shipments—River Crossings to South, 321 I.C.C. 582 (1963), as support for the use of fully-distributed costs to determine the existence of low-cost advantage, but in that case, after an extensive analysis, the Commission, adopted the use of out-of-pocket costs for such purpose. One of the Commission's bases for using out-of-pocket costs was that the competing mode was unregulated, 321 I.C.C. at 596-604. Significance should not be lost of the fact that unregulated transportation operates lawfully and constitutes a major segment of the national transportation system. But nowhere in *Ingot Molds* does the Commission explain why the out-of-pocket standard used in *Grain in Multiple Car Shipments* should not be equally applicable to competition between regulated modes. See 326 I.C.C. at 81.

25. 268 F. Supp. at 77. The railroads presented four economists whose testimony dealt exclusively with the recognition and preservation of inherent advantage of low cost. Their testimony is printed in the Appendix to Railroads' Brief in the lower court at App. 35-135. As to the use of out-of-pocket costs, *i.e.*, incremental costs, to measure relative efficiency from the cost standpoint, Dr. Heflebower, for example said:

> Where the intermediate long-run incremental cost of another transport industry is above that of railroads (for service of equivalent quality) that other industry is not as economically efficient as the railroads. On the other hand, where the intermediate long-run incremental cost of any other transport mode is below that of railroads, it is more efficient, *Id.* at App. 99.

If the Commission had adhered to sound economic principles and had used out-of-pocket costs to measure inherent advantage of lower costs, it should have concluded such advantage was possessed by the railroads since it found that the railroads' "out-of-pocket costs are lower than the barge-motor lines' variable costs." 326 I.C.C. at 84.

gated to accept or to agree with this testimony, as the lower court said: "such did at least, . . . make it necessary for the Commission to set forth adequate reasons to support its own approach. Such reasons are lacking in the Commission's report." [26]

The lack of a stated rationale for using a comparison of fully-distributed costs for determining the existence of low-cost advantage is plain enough from the Commission's report and is made even more so by the lower court's opinion. But if this is so with respect to the determination of low-cost advantage, the lack of rationale becomes more

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26. 268 F. Supp. at 77. See also Chicago Junction Case, 264 U.S. 258, 265; Schaffer Transp. Co. v. United States, 355 U.S. 83, 91-92.

The Commission in its Jurisdictional Statement (No. 809 at pp. 14-16) contends that the railroads failed to carry the burden of showing "that their proposed measure of the inherent advantage of low cost [*i.e.*, the use of out-of-pocket costs] better tested the relative efficiency of competing modes than the established standard [*i.e.*, the unsupported use of fully-distributed costs by the Commission in earlier cases]." It was the railroads' position, as set forth by Dr. Heflebower (*supra*, n.25), that the best measure of low-cost advantage, or of relative efficiency from the cost standpoint, is a comparison of the two competing modes' out-of-pocket costs. Dr. Heflebower was supported by testimony offered by Dr. Baumol in the form of a pronouncement by nine leading economists that:

> An offshoot of the fully distributed cost fallacy is the contention that rail rates should not be permitted to go below the "full cost of the low-cost carrier" (such carrier being determined on the basis of comparative fully distributed cost), whether it be that of a railroad or a different mode of transport. This contention, also, has no validity as a measure of "inherent advantage" or relative economy in the utilization of economic resources of the nation. For the reasons pointed out above, the low-cost carrier is properly identified by incremental cost, not by so-called "full" cost. (Appendix to Railroads' Brief in lower court at App. 70).

Nowhere in the record is this position of the railroads rebutted. If, therefore, the railroads had the burden of proof on the question of how inherent advantage of lower costs is to be measured, they more than bore it.

startling when the Commission addresses itself to the infinitely more crucial problem of how such advantage, with whatever mode it exists, should be preserved.[27] Certainly, this is a problem of paramount importance—but the Commission disposes of it in three sentences, none of which provides any reason for the solution selected. This is all the Commission says:

> In short, by reducing its rate below the level of the barge-truck full costs, the respondent railroads have unlawfully impinged upon the ability of the barge-truck mode competitively to assert its inherent cost advantage. This action we cannot approve. To hold otherwise we would deprive barges from asserting an inherent cost advantage and we would deprive shippers of cheaper water transportation.[28]

The court below quite rightly questions the logic of the Commission's conclusion in the circumstances present and points out that it is wholly unsupported by the cases referred to.[29] The lower court could well have added that

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27. Division 2 of the Commission recognized that the mere determination of which mode has the inherent advantage of lower costs is at most a first step and that the heart of the problem is concerned with how such advantage should be preserved. 323 I.C.C. at 763-765.

28. 326 I.C.C. at 85.

29. As the lower court indicates, 268 F. Supp. at 79, it is utterly beyond comprehension how this particular rail rate "would deprive shippers of cheaper water transportation" since the shipper still has available the existing water-truck service at the same charge that was in effect prior to the rail reduction. In addition to such water-truck service, the shipper also has the availability of rail service at the same charge. Far from being deprived of cheaper water service, the shipper now has a choice of two services, both offered at the identical charge.

Further it should be noted that the cases of this Court, referred to by the Commission as support for its method of preserving inherent advantage of lower costs, not only were inapposite because they were not concerned with Section 15a(3) or the preservation of inherent

it is equally evident the Commission has established as the floor for one mode's reduced pricing a different mode's fully-distributed cost level without any explanation whatsoever as to how this artificial price-pegging device preserves inherent advantage of lower costs or otherwise fosters any of the purposes of the National Transportation Policy—for example, the "establishment and maintenance of reasonable charges for transportation services."

This Court, in *New Haven,* left, for initial resolution by the Commission, the important questions of how the inherent advantages of competing transportation modes should be recognized and preserved when judging the reasonableness and lawfulness of reduced intermode competitive pricing. Here the Commission, in a proceeding unencumbered by any real dispute as to the facts, had these questions squarely before it. To assist the Commission in its consideration of these questions, the railroads presented the testimony of four eminent economists. The substance of the unrebutted testimony of these economists was that the use of fully-distributed costs as a floor for reduced intermode competitive pricing cannot be justified and that the advantage of lower costs is best recognized and preserved by establishing the proponent mode's own out-of-pocket costs as the floor. This, they said, is the basic and elementary teaching of well-recognized economic principles that are universally applicable to all types of business and industrial enterprises and equally applicable to the transportation industry. They further explained that the use of the out-of-pocket cost floor would implement and add prac-

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advantage, but also lacked value as precedents in this area because this Court in *New Haven* made no reference to them at all, saying that the question of how inherent advantage is to be preserved was for the Commission initially to resolve. Interstate Commerce Commission v. New York, N.H. & H.R. Co., 372 U.S. 744, 761.

tical meaning to the mandates of the National Transportation Policy.[30]

Surely, in view of the importance that this Court has placed upon the problems and the depth of the railroads' efforts in advancing a sensible, workable and legally sound solution, the Commission's incredibly perfunctionary solution to the critical phase of the problems, namely, the preservation of inherent advantage, falls far short of reasonable expectations. And more significant perhaps from the standpoint of the question now before this Court, it emphasizes the soundness of the lower court's judgment that the Commission's unsupported conclusion regarding the preservation of low-cost advantage lacks a rational basis.

The lower court has not assumed to itself, as claimed in the several Jurisdictional Statements, any jurisdiction exclusively that of the Commission. Rather, it has exercised the entirely proper function of a court reviewing administrative agency action, and has made a careful and diligent study to determine how the relevant statutory provision should be interpreted to carry out the objectives and purposes of the Congress. See *Fed. Trade Comm. v. Gratz*, 253 U.S. 421, 427; 4 DAVIS, ADMINISTRATIVE LAW TREATISE, § 30.09, at p. 241 (1958). Based upon this study, the lower court has concluded that the inherent advantage of lower

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30. The testimony of the economists is printed in the Appendix to the Railroads' Brief in the court below at App. 35-135. Their views are fully consistent with the pronouncements of the Council of Economic Advisers in their 1965 ANNUAL REPORT (at p. 127) and of the Royal Commission on Canadian Economic Prospects (Nov. 1957) which said:

> Of course, any traffic which meets its long-run out-of-pocket costs and makes some contribution to common overheads, no matter how small, should be carried by the carrier concerned; in this way overheads on the remaining traffic are reduced, all shippers are better off, and the most efficient use of transport resources is promoted.

costs will be preserved as required by the National Transportation Policy by the Commission adhering to the policy of normally approving constructive rate reductions which are compensatory and "not detrimental" to the proponent mode's own "revenue requirements."[31]

But the lower court made it plain that it was not establishing the normal rule as an absolute one and that deviations might be possible if supported by a rational basis, saying:

> We do not mean to suggest that there may not be situations where the Commission has power, under Section 15a(3) and the National Transportation Policy, to prohibit reduced rates even though they are compensatory. What we do suggest is that Congress has expressed a clear intent that reduced compensatory rates should normally be allowed and that the record here and the Commission's report supply no basis for disregarding that intent.[32]

In this instance, since a rational basis for an obvious deviation is wholly lacking, the lower court correctly concluded that the Commission's condemnation of the reduced rail rate is "not in accordance with law."

## THE RELIEF REQUESTED

It is most respectfully submitted that a case for plenary review does not here exist and therefore the judgment of

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31. Interstate Commerce Commission v. New York, N.H. & H.R. Co., 372 U.S. 744, 759.

32. 263 F. Supp. at 82-83.

the lower court should be affirmed by the granting of this motion.

Respectfully submitted,

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## PROOF OF SERVICE

I, CARL HELMETAG, JR., one of the attorneys for the the Railroad appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the —— day of December, 1967, I served copies of the Motion to Affirm of the appellee Railroads on counsel for all the parties to this action as follows:

1. On the United States, by mailing copies in duly addressed envelopes:

A. With first-class postage prepaid to the Honorable Edwin N. Griswold, Solicitor General, Honorable Ramsey Clark, Attorney General, Honorable Donald F. Turner, Assistant Attorney General, Lionel Kestenbaum, Esq., and Robert K. Johnson, Esq., Attorneys, Department of Justice, Washington, D. C. 20530.

B. With air mail postage prepaid to the Honorable Ernest W. Rivers, United States Attorney and Honorable William B. Martin, Assistant United States Attorney, Federal Building, Room 211, Louisville, Ky. 40201.

2. On the appellant Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with first-class postage prepaid to its attorneys, Honorable Robert W. Ginnane, General Counsel, Honorable Fritz R. Kahn, Associate General Counsel, Honorable Leonard S. Goodman, Associate General Counsel, Washington, D. C. 20423.

3. On the separate appellants herein, by mailing copies in duly addressed envelopes:

A. With air mail postage prepaid to Robert E. Webb, Esq., 701 Kentucky Home Life Building, Louisville, Ky. 40202; and with first-class mail postage prepaid to Harry

C. Ames, Jr., Esq., 529 Transportation Building, Washington, D. C. 20006, attorneys for Mississippi Valley Barge lines, et al.

B. With air mail postage prepaid to S. Russell Smith, Esq., 500 Marion E. Taylor Building, Louisville, Ky. 40202; and with first-class mail postage prepaid to A. Alvis Layne, Esq., 948 Pennsylvania Building, Washington, D. C. 20004; and Robert L. Wright, Esq., 1610 Barlow Building, Washington, D. C. 20015, attorneys for the American Waterways Operators, Inc.

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CARL HELMETAG, JR.